LIBRARY
SUPREME COURT, U. S.

71-667

Supreme Court, U.S.
FILED
DEC 7 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. 667.

BERNARD M. GROSS and HARRIS J. SKLAR,
Petitioners,

v.

RAYMOND R. WALSH, Trustee in Bankruptcy
of the Estate of
TIME SALES FINANCE CORPORATION, Bankrupt
and
JEROME ROSOFF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

DAVID F. BINDER,
121 S. Broad Street,
Philadelphia, Pa. 19107
Counsel for Respondent, Jerome Rosoff.

MELVIN LASHNER,
1900 Two Penn Center Plaza,
Philadelphia, Pa. 19102
Counsel for Respondent, Raymond R. Walsh, Trustee.

S. ROBERT LEVANT,
Of Counsel.

SIDNEY CHAIT,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
QUESTION PRESENTED	1
STATUTORY PROVISIONS INVOLVED	2
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	5
I. There Is No Reason Justifying Review	5
II. The Decision of the Court Below Was Correct	6
CONCLUSION	8

TABLE OF CITATIONS.

Cases:	Page
Bank of Marin v. England, 385 U. S. 99 (1966)	6
General Insecticide Co., Inc., In re, 403 F(2) 629 (2 Cir. 1968)	7
Local Loan Co. v. Hunt, 308 U. S. 295 (1934)	6
Morrison v. Burnette, 154 F. 617 (8 Cir. 1907)	5
Pepper v. Litton, 308 U. S. 295 (1939)	6
Pottasch Bros. Co., Matter of, 79 F(2) 613 (2 Cir. 1935)	6
Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U. S. 434 (1940)	6
Standard Brass Corp. v. Farmers National Bank of Belvidere, 388 F(2) 86 (7 Cir. 1967)	7
Stanley Engineering Corporation, In re, 164 F(2) 316 (3 Cir. 1947)	5, 7
Tastyeast, Inc., In re, 126.126 F(2) 879 (3 Cir. 1942)	6
Wolke Lead Batteries Co., Matter of, 294 F. 509 (6 Cir. 1923)	5

Miscellaneous:

11 U. S. C. § 11a	2, 6
11 U. S. C. § 67c	2, 5, 7
2 Collier on Bankruptcy ¶ 38.09(3)	6
Restatement: Judgments § 120	7

BRIEF FOR RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondents respectfully pray that the Supreme Court deny a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 9, 1971 (rehearing denied on August 19, 1971).

QUESTION PRESENTED.

Did the Referee in Bankruptcy properly exercise his discretion by reconsidering and setting aside an order confirming a sale of real estate to a bidder at a hearing on the trustee's petition to sell the property to another buyer, the original offeror, where the Referee learned within less than an hour after the conclusion of the hearing that the original offeror was not present and therefore unable to bid competitively at the hearing because of the mistake of the trustee's attorney in failing to notify him of the hearing?

STATUTORY PROVISIONS INVOLVED.

1. Section 2a of the Bankruptcy Act, 11 U. S. C. § 11a, which states:

> "The Courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested . . . with such jurisdiction at law and equity as will enable them to exercise original jurisdiction in proceedings under this Act . . ."

2. Section 39c of the Bankruptcy Act, 11 U. S. C. § 67c, which states:

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof . . . file with the referee a petition for review of such order by a judge . . . Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final . . ."

COUNTERSTATEMENT OF THE CASE

The trustee in bankruptcy entered into an agreement of sale to sell real estate to Jerome Rosoff (herein referred to as original offeror) for a consideration in the sum of $90,000, subject to approval by the Bankruptcy Court. The trustee filed a petition seeking approval of the sale, after hearing upon notice, and the Referee ordered a hearing to be held to consider the petition upon at least ten days notice in writing to all known creditors and parties in interest.

Pursuant to the Referee's order, various notices were mailed, including notice to each of two parties who had previously expressed to the trustee's counsel an interest in submitting an offer for the property (one of whom was one of the petitioners herein). However, no notice was given to the original offeror or anyone on his behalf.

At the hearing, having been erroneously informed that notice had been given in conformity with his order, the Referee proceeded to consider the petition to sell at private sale. When the Referee asked for higher bids, one was submitted by petitioners in the amount of $90,500. In the absence of the original offeror, no other bid was made, and the Referee entered an order confirming the sale to petitioners.

A few minutes after the hearing ended, counsel for the trustee discovered his error and brought the various parties —including petitioners and the original offeror—before the Referee. The Referee reconvened the hearing, less than an hour after the close of the previous hearing, and indicated his intention to reopen the proceedings, if in fact no notice had been given to the original offeror. At the request of petitioners, the matter was continued to enable them to be represented by counsel.

When the hearing was reconvened three days later, testimony by the original offeror, his attorney, and counsel for the trustee established that the agreement of sale pre-

cluded a hearing on confirmation until at least two days later than the actual first hearing was held, that the hearing was scheduled earlier as a matter of convenience, and that neither the original offeror nor anyone on his behalf had been given or actually had notice of the hearing to confirm the sale. The lack of notice was due to the admitted mistake made by counsel for the trustee. It was further established that the original offeror would enter a higher bid if the Referee would entertain bidding.

The Referee entered an order reconsidering and setting aside his prior order confirming the sale to petitioners, and directing that another hearing be held upon due notice to all parties as set forth in his prior order of notice. The District Court, on review, set aside the Referee's latest order and reinstated the order confirming the sale to petitioners.

The respondents (trustee and original offeror) appealed to the Court of Appeals which reversed the District Court and reinstated the Referee's order.

The District Court erroneously applied principles applicable to an attempt to set aside a final and unappealable confirmation of a sale. It failed to realize that the motion to set aside the confirmation, based on the mistake of counsel for the trustee, was made within less than an hour after the entry of the order and well within the ten days allowed for review of a Referee's order. The District Court failed to recognize that the issue before the Referee, on motion to reconsider, was not the setting aside of a final and unappealable order of confirmation, but simply whether the sale should be confirmed to petitioners in the absence of notice to the original offeror.

The Court of Appeals considered the Referee's action to have been sound and consistent with the law governing the stability and integrity of judicial sales.

ARGUMENT.

I. There Is No Reason Justifying Review.

The issue before the Court in the present case is limited to the specific parties based upon this particular set of facts and cannot by any stretch of imagination be converted into a matter of constitutional application needing review by this Court.

The question which petitioners seek to have reviewed is simply one involving the exercise of discretion by a Referee in Bankruptcy in setting aside an order of private sale, which had not become final, by reason of the mistake of the Trustee's attorney which resulted in depriving the original offeror of an opportunity to better a competitive bid at the hearing on the sale.

We respectfully submit that the matter is of little moment nationally, involves no grave questions of constitutional law, and is ill founded for consideration by the Supreme Court.

The decision by the Court below is not in conflict with *Morrison v. Burnette,* 154 F. 617 (8 Cir. 1907) nor with *Matter of Wolke Lead Batteries Co.,* 294 F. 509 (6 Cir. 1923). *Morrison* involves a bidder with opportunity to bid prior to confirmation who sought to increase his bid after confirmation to another. *Wolke* actually supports our position. It holds that the Court is vested with discretion to set aside a confirmation of a sale at any time prior to its becoming final and unappealable. An order of a Referee does not become final until more than ten days has passed without an application for review. 11 U. S. C. § 67c. Nor does the decision of the Court below conflict with its prior decision in *In re Stanley Engineering Corporation,* 164 F(2). 316 (3 Cir. 1947). The *Stanley* case is discussed below.

It is obviously contrived to argue that the statement of the Court below, that the major question is one of common decency, offends Article 1, Section 8 of the Constitution. The decision of the Court below is based upon considerations of equity and fairness. The Bankruptcy Court is invested with jurisdiction at equity by the express provisions of the Bankruptcy Act. 11 U. S. C. § 11a. The Court is essentially a court of equity, and equitable principles govern the exercise of its bankruptcy jurisdiction. *Local Loan Co. v. Hunt*, 292 U. S. 234 (1934); *Pepper v. Litton*, 308 U. S. 295 (1939); *Securities and Exchange Commission v. United States Realty & Improvement Co.*, 310 U. S. 434 (1940); *Bank of Marin v. England*, 385 U. S. 99 (1966); *In re Tastyeast, Inc.*, 126 F(2) 879 (3 Cir. 1942), cert. den. 316 U. S. 696 (1942).

II. The Decision of the Court Below Was Correct.

(a) It is clear that a Referee in Bankruptcy has the same power to reconsider his orders as the District Judge has over his. *Matter of Pottasch Bros. Co.*, 79 F(2) 613 (2 Cir. 1935); 2 *Collier on Bankruptcy* ¶ 38.09(3), at 1434-1435.

(b) Upon rehearing, the Referee should vacate an order confirming a private sale whenever the order is entered through mistake or inadvertence and there is unfairness to an innocent, bona fide bidder, and to the estate.

The fundamental error made by the District Court was in treating the motion for rehearing as if it were a new proceeding to set aside a final and unappealable order confirming a sale. In fact, the motion to reconsider had been made within less than an hour after its entry; and the issue at that point of time was simply whether the Referee, in his discretion, should grant or deny confirmation.

The District Court noted the distinction between a proceeding to confirm a sale and a proceeding to set aside

a final and unappealable order of confirmation, but then erroneously proceeded to deal with the case as if it were the latter rather than the former. It is clear that an appellate court applies a stricter standard to a proceeding to set aside a final order of sale than it does to a timely review of an order of confirmation: *In re General Insecticide Co. Inc.*, 403 F(2) 629 (2 Cir. 1968).

An error by the Court or one of its officers is well recognized as a substantial reason for setting aside a judgment of the Court and, by analogy, an order of confirmation of a sale by a Referee. The mistake in this case was made by counsel for the trustee, not an adversary in presenting an offer to purchase estate property, but one who is acting on behalf of the estate and the Court as well. *Restatement: Judgments*, § 120. The equities in favor of vacating the order of confirmation are even stronger when, as here, the order in question had not yet become final. 11 U. S. C. § 67c; *Standard Brass Corp. v. Farmers National Bank of Belvidere*, 388 F(2) 86 (7 Cir. 1967).

(c) It is difficult to imagine a clearer case of mistake which would compel the vacation of an order confirming a sale than one where, as here, the Referee in entering the original order of confirmation was unaware that the original offeror was absent because he had neither notice nor knowledge of the hearing. With that party absent, the validity of the bidding which the Referee sought to elicit was highly suspect.

(d) The decision in *In re Stanley Engineering Corporation*, 164 F(2) 316 (3 Cir. 1947), relied upon by petitioners and the District Court below, is completely irrelevant on its facts. *Stanley* stands for the principle that a judicial sale must be conducted with fairness. A Court must be concerned with the integrity as well as the stability

of judicial sales. The Court of Appeals in the present case did not set aside a high bid to permit an after appearing bidder to offer more money after the auction had ended. On the contrary, the Court of Appeals sustained the Referee's conclusion that it would be shockingly unfair to deprive the original offeror of an opportunity to bid because of the mistake of counsel for the trustee.

(e) Even if the Referee's action is judged by the standard for setting aside a final and unappealable order of sale, the failure of notice in this case was a mistake justifying the action taken by the Referee. The mistake of counsel for the trustee went to the very heart of the integrity of the proceedings. One of the key elements necessary to assure the integrity of a judicial sale is that adequate notice be given to interested parties, including persons *known* to be interested in bidding for the property. The only competitive bidding at an authorized private sale takes place at the hearing on confirmation when the Court considers the offer presented and invites higher bids from anyone else present. The mistake in failing to notify the original offeror effectively destroyed the possibility of competitive bidding in this case and resulted in a manifest injustice not only to the original offeror but to the estate as well.

CONCLUSION.

The Referee has the inherent power to reconsider his own orders. Upon rehearing of an order confirming a private sale less than ten days after the entry of the order, the Referee should vacate an order of confirmation whenever it is entered through mistake, especially if it results in unfairness to an innocent, bona fide bidder and to the estate. In this case the failure to give notice of the hearing

to the original offeror resulted in a confirmation hearing which was fundamentally defective. The defect is best cured and the policies of the Bankruptcy Act best served by allowing the Referee the widest possible discretion to correct his order. In any event, the mistake in this case is of such magnitude and importance as to shock the conscience of the Court and justify the setting aside of a final and unappealable order of sale let alone vacate an order of confirmation which had not become final. The holding of the Court of Appeals, based on equitable considerations, was clearly correct.

We respectfully urge that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DAVID F. BINDER,
121 S. Broad Street,
Philadelphia, Pa. 19107
Counsel for Respondent,
Jerome Rosoff.

Of Counsel:
S. ROBERT LEVANT.

MELVIN LASHNER,
1900 Two Penn Center Plaza,
Philadelphia, Pa. 19102
Counsel for Respondent,
Raymond R. Walsh, Trustee.

Of Counsel:
SIDNEY CHAIT.